BURGWYN *v.* JONES et al.

June 13, 1912.

[75 S. E. 188.]

1. **Frauds, Statute of (§ 76*)—Parol Partnership Agreement.**—A parol agreement, which creates a partnership for the purchase and sale of real estate for speculation and for the division of the profits among the partners, is valid, notwithstanding the statute of frauds, and the existence of the firm and the interest of the partners may be proved by parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 135-139; Dec. Dig. § 76.* 14 Va.-W. Va. Enc. Dig. 482.]

2. **Frauds, Statute of (§ 76*)—Parol Partnership Agreement—"Agreement for the Sale of Real Estate."**—A parol agreement, creating a partnership and giving the partners an interest in real estate owned by a partner at the time of the formation of the firm is an agreement for sale of real estate, within the statute of frauds, and is void.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 135-139; Dec. Dig. § 76.* 6 Va.-W. Va. Enc. Dig. 583.]

Appeal from Circuit Court, Nottoway County.

Suit by C. P. E. Burgwyn against W. I. Jones and others. From a decree of dismissal, plaintiff appeals. Affirmed. CARDWELL, J., absent.

Chas. E. Plummer, for appellant.

W. Moncure Gravatt, T. Freeman Epes, and *H. H. Watson,* for appellees.

MULLINS *v.* COMMONWEALTH.

June 18, 1912.

[75 S. E. 193.]

1. **Criminal Law (§ 366*)—Evidence—Admissibility—Res Gestæ.**—The declarations of deceased, shortly before leaving home on a trip, during which it was claimed he was murdered, that he was going for whiskey, and that accused was going with him, not made in the presence of accused, were incompetent, not being a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.* 11 Va.-W. Va. Enc. Dig. 922.]

2. **Homicide (§ 166*)—Evidence—Motive.**—Testimony that accused had been indicted for another crime, and that prosecutor intended to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

call deceased as a witness on the trial of that case, was incompetent to show motive for a homicide, in the absence of evidence that deceased had been summoned as a witness, or that accused knew deceased was to be a witness, or knew that deceased knew anything about the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.* 5 Va.-W. Va. Enc. Dig. 308.]

3. Homicide (§ 166*)—Evidence—Motive.—Where it was claimed that the motive for a homicide was to prevent deceased testifying against accused in another case, testimony that accused's wife said to him that "he" would be the hardest witness against accused, and that accused replied that he would not be at court, was incompetent, where the witness did not know of whom they were talking, and no offer to show that it referred to deceased was made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.* 7 Va.-W. Va. Enc. Dig. 140, 142; 5 Va.-W. Va. Enc. Dig. 308.]

4. Criminal Law (§ 1169*)—Appeal—Harmless Error—Rulings on Evidence.—Error in admitting testimony relative to a conversation between accused and his wife concerning a third person was not cured by an instruction to disregard, unless the jury found that the conversation referred to deceased, where there was no evidence on which the jury could base such a finding, since it was for the court, and not for the jury, to determine the competency of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.* 1 Va.-W. Va. Enc. Dig. 592; 5 Va.-W. Va. Enc. Dig. 345.]

5. Criminal Law (§ 719*)—Trial—Conduct of Counsel—Comments on Evidence.—A remark of the prosecuting attorney that in his opinion a conversation between accused and his wife, shown by the evidence, referred to deceased, was prejudicial to accused, where there was no evidence on which such an opinion could be properly based.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.* 1 Va.-W. Va. Enc. Dig. 718.]

6. Homicide (§ 223*)—Evidence—Proceedings at Inquest—Statement of Accused.—Under Code 1904, § 3901, providing that in criminal prosecutions, with certain exceptions, statements by accused upon a legal examination shall not be given in evidence against him, unless made when examined as a witness in his own behalf, statements by accused on his examination at the coroner's inquest were improperly admitted at the trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.* 4 Va.-W. Va. Enc. Dig. 89, 90.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

7. Criminal Law (§ 789*)—Trial—Instructions—Reasonable Doubt.—An instruction that a reasonable doubt is such a doubt as may be honestly and reasonably entertained, and must be based on the evidence, that it must not be an arbitrary doubt, but must be serious and substantial, and must be a doubt of a material fact necessary for the jury to believe to find a verdict of conviction, and not of immaterial and nonessential circumstances, while possibly of little aid to the jury, could not have misled them, when considered in connection with another instruction that the jury should not go beyond the evidence to hunt up doubts, nor entertain doubts merely chimerical or conjectural, that a doubt justifying the acquittal must arise from a candid and impartial investigation of the evidence, and is insufficient unless it is such that, if interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate, and that if, after considering all the evidence, the jury could say that they had an abiding conviction of the truth of the charge, they would be satisfied beyond all reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.* 11 Va.-W. Va. Enc. Dig. 636.]

Appeal from Circuit Court, Wise County.

Morgan Mullins was convicted of murder in the second degree, and he appeals. Reversed. CARDWELL, J., absent.

Vickers v. Peery, and *A. A. Skeen,* for the plaintiff in error.
Atty. Gen. Samuel W. Williams, for the Commonwealth.

GRAY *v.* ATLANTIC TRUST & DEPOSIT CO., Inc., et al.

June 13, 1912.

[75 S. E. 226.]

1. Cancellation of Instruments (§ 37*)—Pleading—Bill.—A bill to set aside a trust deed or chattel mortgage on the ground that it was invalid and fraudulent per se need not allege facts showing a fraudulent intent on the part of the grantor or grantee, the gravamen being that the mortgage was not sufficient as a matter of law, and so intentional or actual fraud is unnecessary to its invalidity.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.* 6 Va.-W. Va. Enc. Dig. 498.]

2. Chattel Mortgages (§ 72*)—Invalidity—Actual Fraud.—Actual or intentional fraud need not be imputed to the grantee, the trustee,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.